



September 6, 2011

Fethi Benjemaa
Department of Water Resources
901 P Street, Suite 313A
Sacramento, CA 95814

Sent via email to: jemaa@water.ca.gov

RE: Comments on Proposed Agricultural Water Measurement Regulations

Dear Mr. Benjemaa:

On behalf of the Natural Resources Defense Council, Pacific Institute, and Sierra Club California, which together have several hundred thousand members and activists in California, we are writing to provide additional comments on the Department of Water Resources' ("Department") proposed agricultural water measurement regulation. Unfortunately, as explained in our prior comments¹ and as further explained below, the current draft regulation conflicts with and fails to meet the statutory purposes of the Water Conservation Act of 2009 (SB 7X 7 of 2009) ("Act").

At the August 17, 2011 public meeting of the California Water Commission ("Commission"), staff counsel from the Department explained that the Department expects to revise the regulation in response to comments, and submit a revised regulation for approval by the Commission. We hope and expect that the Department recognizes that many of our concerns are meritorious, and that the Department will carefully consider these and our prior comments in issuing a revised regulation for approval by the Commission. We look forward to working with the Department and Commission on a revised regulation, and would be happy to answer any questions you have regarding these comments and recommended changes.

¹ Our prior comment letters, dated June 14, 2011, and May 17, 2011 are attached hereto as Exhibit A and are incorporated by this reference. Because the draft permanent regulation is identical to the emergency regulation, our prior comments on the emergency regulation are applicable to this regulation as well.

I. The Proposed Regulation Impermissibly Fails to Require Accurate Measurement of the Volume of Water Delivered to the Farm Gate

Section 10608.48(b) of the Water Code, part of the Act, requires measurement of the volume of water delivered to customers at the farm gate. The legislation built on, and explicitly cross-referenced, existing statutory requirements (AB 1404 of 2007, Water Code § 531.10(a)) relating to the measurement of water delivered to agricultural customers. Section 531.10(a) requires agricultural water suppliers to report farm-gate water delivery data, and section 531.10(b) exempts suppliers from having to comply with this and other requirements of AB 1404 if the programs or practices are not locally cost effective. Indeed, in its recent guidelines on implementation of section 531.10(a), the Department explicitly recognized that in order to comply with section 531.10(a), an affected supplier must “measure farm-gate deliveries.”²

However, as noted in our prior comment letters, the proposed regulation allows measurement upstream of the farm gate if the supplier lacks access to the farm gate (§ 597.3(b)(1)(A)) or if the supplier cannot measure deliveries with a single, standard measurement device (§ 597.3(b)(1)(B)). These exceptions are overbroad and are inconsistent with the mandate of the Water Conservation Act of 2009. We have repeatedly provided alternative language for these regulatory sections that are consistent with the requirements of the statute.

These exceptions have the potential to exempt a significant proportion of the State from measurement at the farm gate. For instance, the Department’s economic analysis estimates that, “half of the potentially affected irrigated acreage in the Sacramento Valley region would be measured at the lateral level.”³ That economic analysis further assumes that all other suppliers would measure at the turnout,⁴ but this assumption is arbitrary in light of the breadth of these two exceptions and the failure to consider whether other suppliers would utilize these exceptions. Thus it is likely that an ever greater proportion of affected water deliveries will not be measured at the farm gate.

A. Section 597.3(b)(1)(A)

Section 597.3(b)(1)(A) impermissibly exempts water suppliers from measuring water deliveries at the farm gate if they lack legal access to the farm gate. Some water suppliers may have never needed legal access to the farm gate and may not currently have such access, but are authorized by law to acquire such access. In addition, urban water agencies have successfully implemented a similar statutory mandate to install meter waters on the private property of their urban customers, without resorting to this kind of exception.

² These guidelines were circulated by the Department on November 10, 2010, and are available online at: http://www.water.ca.gov/calendar/materials/ab_1404_package_10096.pdf. The quotation is from page 2 of the Guidelines (page 12 of 15 of the PDF).

³ Department of Water Resources, Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement, April 22, 2011, at page 10.

⁴ *See id.* (“It is assumed for purposes of this analysis that suppliers in other regions use only turnout-level measurement.”)

As noted in our earlier comments, section 397.3(B)(1)(A) is overbroad and may allow water suppliers to avoid measurement at the farm gate, without even requiring the water supplier to ask for permission to access the private canal. For instance, this exception may prevent measurement at the farm gate if water is delivered through canals owned by mutual water companies, which could affect significant numbers of water suppliers. However, according to the materials provided by the Department, mutual water companies are organized to deliver water to stockholders at cost, Water Code § 2725, and cannot deliver water to non-stockholders except during times of war, Water Code §§ 2727-28.⁵ Thus, the mutual water company stands in privity with the customer(s) served by the agricultural water supplier, and the supplier should be able to obtain access, and should be required to attempt to obtain access to the farm gate.⁶ The regulation should be revised consistent with the proposed language in our June 14, 2011 comments, or in a similar manner that narrows this loophole.

B. Section 597.3(b)(1)(B)

To our knowledge, the Department has never provided a rationale why this section is limited to a single measurement device, particularly when two devices may effectively and accurately measure water deliveries at the farm gate. The obvious, albeit unstated, reason for this exception is the cost of requiring more than one measurement device. However, as we have previously noted, two provisions of SB 7X 7 conclusively demonstrate that a “locally cost effective” exemption does not apply to the measurement requirement. First, the Act includes explicit cost-effectiveness exemptions for other efficiency practices in section 10608.48(c), but not with respect to water measurement and volumetric pricing requirements in section 10608.48(b); and second, the 2009 legislation did not reference or incorporate subdivision (b) of section 531.10 (the locally cost effective exemption of AB 1404), instead only referencing subdivision (a) of section 510.10. Even the Department has acknowledged that the legislation does not provide any exceptions from the measurement requirement, including exceptions on the basis of cost-effectiveness.⁷

In order to be consistent with the statutory requirements, the regulation should be revised to require measurement at the farm gate if one or more measurement devices (e.g., a high and low flow measurement device) can accurately measure water deliveries at the farm gate. Numerous water districts, including districts delivering water to rice farmers in the Sacramento Valley, successfully measure water deliveries at the farm gate. The regulation should set a performance

⁵ These materials were provided by the Department at the November 9, 2010 meeting. See http://www.water.ca.gov/calendar/materials/mutual_water_companies_-_california_codes_10172.pdf.

⁶ Indeed, even where a mutual water company controls the canal delivering water, the customer may own and control the land where the farm gate is located, and thus allow for installation of the measurement device on the customer’s property, bypassing this issue entirely.

⁷ Initial Statement of Reasons, Certificate of Compliance Rulemaking Related to Emergency Rulemaking File #2011062401E, July 21, 2011, at 7 (“Unlike other efficient water management practices that are required only when locally cost effective under section 10608.48(c), SB X7-7 legislation does not provide any exemptions from the water measurement requirement of 10608.48(b)(1).”).

standard for measurement at the farm gate, and allow each district to determine the most cost-effective way to do so. Unfortunately, section 597.3(b)(1)(B) impermissibly fails to require measurement at the farm gate, and this section should be revised in accordance with the language proposed in our June 14, 2011 comments.

II. The Proposed Regulation Impermissibly Deems CVP/RRA Contractors in Compliance with the Regulation

Section 597.1 of the draft regulation would provide that CVP contractors “are deemed in compliance” with the requirements of SB 7X 7, and thus exempts such contractors from having to comply with the measurement requirement of Section 10608.48(b). However, all Agricultural Water Suppliers subject to SB 7X 7, including CVP contractors, must meet the measurement requirement of Section 10608.48, and the proposed exemption is unlawful.

SB 7X 7 specifically excludes certain CVP contractors from having to prepare and submit Agricultural Management Plans, permitting certain CVP contractors to instead submit the water conservation plan that has been accepted as adequate by the U.S. Bureau of Reclamation.⁸ A second statutory exemption allows certain CVP contractors to submit their water conservation plan in lieu of reporting, as part of the Agricultural Water Management Plan, the efficient water management practices that have been implemented.⁹ However, while section 10608.48(f) explicitly exempts certain CVP contractors from the reporting requirements of section 10608.48(d) and (e), section 10608.48(f) does not exempt such CVP contractors from the measurement requirements of section 10608.48(b)(1).¹⁰ It is a canon of statutory construction that the existence of specific exemptions negates the implied existence of a broader exemption. *See Wildlife Alive v. Chickering*, 18 Cal.3d 190, 195 (1976) (“Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.”). While the Legislature exempted CVP contractors from reporting requirements, it did not exempt them from the measurement and volumetric pricing requirements of section 10608.48(b).

⁸ *See* Water Code § 10828.

⁹ Water Code § 10608.48(f).

¹⁰ In addition, the Legislature specifically exempted agricultural water suppliers that supply water to less than 25,000 irrigated acres from both the planning and measurement requirements, unless funding is provided. *See* Water Code § 10853. However, the statutory exemption for CVP contractors only applies to the planning and reporting requirements, *see* Water Code §§ 10608.48(f), 10828, and not from the requirement to implement measurement and other efficient water management practices. Because the legislature provided the broader exemption to certain agricultural water suppliers, and provided a narrower exemption to certain CVP contractors, SB 7X 7 cannot be read to apply a broader exemption for CVP contractors that includes an exemption from implementing the water measurement and volumetric pricing requirements of section 10608.48(b). *See Chickering*, 18 Cal.3d at 195.

This exception is important because some CVP contractors currently do not use volumetric pricing or measure the volume of water deliveries to customers at the farm gate.¹¹ Our concern is not just that federal policy and law could change, to weaken existing requirements for volumetric pricing and measurement of water deliveries. Rather, it is that currently, some CVP contractors do not meet the requirements of the Act.

We were pleased to hear that at the August 17, 2011 public meeting of the Commission, staff counsel from the Department agreed that section 597.1(i) of the proposed regulation, which deems certain CVP and RRA contractors to be in compliance with the regulatory requirements, is unlawful and should be removed.¹² Likewise, the Department has acknowledged that with respect to review of this section of the emergency regulation by the Office of Administrative Law (“OAL”),

OAL notified DWR staff they would reject the regulation in its entirety if DWR failed to remove the “or future amendments” phrase from the agricultural water suppliers subject to CVPIA or RRA provision of the regulation. OAL also strongly urged DWR to remove the entire provision regarding agricultural water suppliers subject to the CVPIA or RRA.¹³

We will not repeat here our extensive arguments why this provision is unlawful, which appear to be consistent with the views of both OAL and the Department. Instead, in light of these comments from OAL and the Department’s staff counsel, we strongly encourage the Department and Commission to delete section 597.1(i) from the proposed regulation.

¹¹ In addition, we note that the Bureau of Reclamation appears to accept measurement upstream of the farm gate by at least some agricultural contractors. For instance, with respect to the Settlement Contractors, the cooperative study referenced in the Initial Statement of Reasons acknowledges that these contractors use a mix of lateral and district level measurement under the plan approved by the Bureau, and that in many cases, volumetric measurement is not taken at the lateral, but that volumetric diversion information by the district is required under the plan. *See* Sacramento River Settlement Contractors, Final Cooperative Water Management Study, August 2010, at pp. 5-2 to 5-3, available online at http://rd108.org/images/stories/cooperative%20study_final_aug-09-2010.pdf. Likewise, that document acknowledges that some Settlement Contractors do not currently use volumetric pricing. *Id.* at ES-4. This and other information in the record demonstrates that not all approved CVP/RRA plans are consistent with the statutory requirement to accurately measure water deliveries at the farm gate, and while some CVP/RRA contractors already meet the requirements of the statute and regulation, this provision, which deems all CVP/RRA contractors in compliance, is unlawful and overbroad.

¹² Statement of Spencer Kenner, staff counsel, Department of Water Resources, at the August 17, 2011 meeting of the California Water Commission, available online at: <http://cawater.rmxpres.com/webcast/data/dwr08172011/main.htm#> (the statement occurs at approximately minute 29:45 of the recording) (“... On the CVP provision in terms of its legality and whether it should be in there at all, and my position is it shouldn’t be.”).

¹³ Email from Andria K. Avila, sent July 11, 2011 at 9:15 am, attached hereto as Exhibit B.

III. The Accuracy Standards Should be Strengthened, Including Elimination of Field Inspection

As recommended in our June 14, 2011 comments, the accuracy standard should be revised downward from 12% to 10%, and the references to field inspection should be eliminated. Both of these provisions conflict with the statutory requirement that suppliers “Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).” Cal. Water Code § 10608.48(b)(1).

The 12% accuracy standard in section 597.3(a)(1) is substantially weaker than the 6% accuracy standard applied by the Bureau of Reclamation for its contractors, and the Department has not provided any rationale for authorizing a weaker standard (although cost appears to have been a significant consideration, based on comments received). We have previously recommended a 10% standard, instead of 12%, and continue to recommend that this standard would provide sufficient accuracy.

In addition, as noted in our prior comments, the Department has provided no explanation for what constitutes field inspection as a methodology for determining the accuracy of measuring devices, as provided for in section 597.4 of the draft regulation. To the contrary, the regulation appears to allow field inspection to certify the accuracy of all measurement devices without testing even a single measurement device, nor does the regulation provide any standard or criteria for assessing the accuracy of field inspections. Because nothing in the record explains how field inspections will determine the “sufficient accuracy” of the measurement of water deliveries, the draft regulation should be revised to eliminate field testing.

CONCLUSION

The Water Conservation Act of 2009 was intended to substantially strengthen agricultural water management for large agricultural water suppliers, including a requirement to accurately measure water deliveries at the farm gate. We strongly urge the Department and Commission to revise the proposed regulation consistent with our comments, to ensure that the regulation is consistent with the statutory mandate and to ensure that water suppliers can make the necessary investments in water measurement devices to comply with lawful requirements.

We are encouraged by the recent comments from the Department and OAL regarding the need to revise the draft regulation, and we would be happy to answer any questions you have regarding our comments and recommendations.

Thank you for consideration of our view.

Sincerely,

Doug Obegi
Natural Resources Defense Council

Dr. Juliet Christian-Smith
Pacific Institute

Jim Metropulos
Sierra Club California



NATURAL RESOURCES DEFENSE COUNCIL

June 24, 2011

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Sent via email to: staff@oal.ca.gov and kframe@water.ca.gov


RE: The Department of Water Resources' proposed emergency agricultural water measurement regulation violates Gov. Code § 11349.1 and should be disapproved (OAL File No. 2011-0624-01E)

To whom it may concern:

On behalf of the Natural Resources Defense Council ("NRDC"), which has 250,000 members and activists in California, I am writing to request that the Office of Administrative Law disapprove the draft agricultural water measurement regulation proposed by the Department of Water Resources ("DWR"). As the attached comments demonstrate, NRDC has repeatedly warned DWR and the California Water Commission that the proposed regulation, including sections 597.1(i) and 597.3(b), exceed DWR's statutory authority and are inconsistent with the statutory requirements of SB 7x 7 of 2009. *See* Stats. 2009-2010, 7th Ex. Session, c. 4, § 1. Because the proposed emergency regulation violates the consistency and authority provisions of section 11349.1 of the Government Code, OAL should disapprove the draft emergency regulation. *See* Gov. Code § 11349.6.

Thank you for consideration of our view. We would be happy to discuss this further with you at your convenience if you have any questions or concerns.

Sincerely,


Doug Obegi
Staff Attorney

Encl. June 14, 2011 comments to the California Water Commission regarding the Department of Water Resources' draft proposed agricultural water measurement regulation



June 14, 2011

Mr. Anthony Saracino
Chair, California Water Commission
Department of Water Resources
P. O. Box 942836
Sacramento, CA 94236

SENT VIA EMAIL TO cwc@water.ca.gov

RE: The June 7, 2011 Draft Agricultural Water Measurement Regulation Fails to Comply with SB 7x 7 and Must be Revised

Dear Mr. Saracino and Members of the Commission:

On behalf of the Natural Resources Defense Council, Pacific Institute, and Sierra Club, which together have several hundred thousand members and activists in California, we are writing to recommend that the California Water Commission reject the proposed draft agricultural water measurement regulation, which the Commission will review at its June 15, 2011 meeting. Our organizations were members of the Agricultural Stakeholder Committee (ASC) that was involved in the development of this regulation, and we have provided recommended amendments during the ASC process and before the Water Commission to ensure that the draft regulation complies with the requirements of SB 7x 7 of 2009, the Water Conservation Act of 2009 ("Act"). Unfortunately, as we noted in our May 17, 2011 letter (which is attached), and as discussed in more detail below, the revised draft regulation fails to comply with the Act, and it is both unlawful and bad public policy. We strongly urge the Commission to reject the current draft regulation, and adopt the following recommendations to ensure that the regulation conforms to the requirements of the Act.

As a general matter, SB 7x 7 requires certain large agricultural water suppliers to measure the volume of water delivered at the farm gate, cross-referencing and referring to a prior statutory requirement. Water Code § 10608.48(b) (citing Water Code § 531.10(a)). However, section 10608.48(b) only cross-references the requirement in section 531.10(a) to measure the volume of water deliveries at the farm gate, and explicitly does not reference the exemption for local cost-effectiveness that is provided in section 531.10(b) of the water code. As a result, the proposed exemption allowing measurement at the lateral, rather than the farm gate, because of cost considerations associated with requiring two measurement devices (one high flow, one low flow) is inconsistent with the statutory requirement. *See id.*¹

¹ The exemption allowing measurement at the turnout because of a lack of access to the farm gate is overbroad, particularly when the regulation does not require water districts to use their legal authorities to try to obtain access.

Similarly, Section 597.1 of the draft regulation would provide that CVP contractors “are deemed in compliance” with the requirements of SB 7x 7, and thus exempts such contractors from having to comply with the measurement and pricing requirements of Section 10608.48(b). However, all Agricultural Water Suppliers subject to SB 7X 7, including CVP contractors, must meet the measurement requirement of Section 10608.48, and the proposed exemption is unlawful.

SB 7X 7 specifically excludes certain CVP contractors from having to prepare and submit Agricultural Management Plans, permitting certain CVP contractors to instead submit the water conservation plan that has been accepted as adequate by the U.S. Bureau of Reclamation. *See* Water Code § 10828. A second statutory exemption allows certain CVP contractors to submit their water conservation plan in lieu of reporting, as part of the Agricultural Water Management Plan, the efficient water management practices that have been implemented. Water Code § 10608.48(f). However, while section 10608.48(f) explicitly exempts certain CVP contractors from the reporting requirements of section 10608.48(d) and (e), section 10608.48(f) does not exempt such CVP contractors from the measurement requirements of section 10608.48(b)(1).² It is a canon of statutory construction that the existence of specific exemptions negates the implied existence of a broader exemption. *See Wildlife Alive v. Chickering*, 18 Cal.3d 190, 195 (1976) (“Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.”). While the Legislature exempted CVP contractors from reporting requirements, it did not exempt them from the measurement and volumetric pricing requirements of section 10608.48(b).

Finally, several provisions of the proposed regulation fail to require measurement with sufficient accuracy, or introduce vague and undefined terms that undermine accurate measurement. On the pages that follow, we provide recommended amendments to the following provisions of the draft regulation:

1. Exemption for CVP Contractors (§ 597.1(i))
2. Exemptions from requirement to measure at the farm gate (§ 597.3(b))
3. Accuracy certification and standards (§ 597.3(a)(1), (2))
4. Field inspections (§ 597.4(a),(b))

While we recognize that the proposed regulation has changed over the past month, and we appreciate the Department’s hard work on this draft regulation, unfortunately most of the concerns we have repeatedly raised have not been adequately addressed. We strongly urge the Commission to adopt the recommendations identified below.

Both of these exemptions were discussed at length in our May 17, 2011 letter, which is attached and incorporated into these comments.

² In addition, the Legislature specifically exempted agricultural water suppliers that supply water to less than 25,000 irrigated acres from both the planning and measurement requirements, unless funding is provided. *See* Water Code § 10853. However, the statutory exemption for CVP contractors only applies to the planning and reporting requirements, *see* Water Code §§ 10608.48(f), 10828, and not from the requirement to implement measurement and other efficient water management practices. Because the legislature provided the broader exemption to certain agricultural water suppliers, and provided a narrower exemption to certain CVP contractors, SB 7X 7 cannot be read to apply a broader exemption for CVP contractors that includes an exemption from implementing the water measurement and volumetric pricing requirements of section 10608.48(b). *See Chickering*, 18 Cal.3d at 195.

RECOMMENDATION #1: Eliminate the unlawful exemption for CVP contractors (Exhibit 4)

Recommendation: Delete section 597.1(i) of the draft regulation.

RECOMMENDATION #2: Narrow the Exemptions That Allow Measurement Upstream of the Farm Gate (Exhibits 3a and 3b)

(i) Lack of Access Exemption (Exhibit 3a)

Recommendation: Revise subpart 597.3(b)(1)(A) to read as follows:

The agricultural water supplier does not have, and lacks the legal authority to obtain, legal access to the customer delivery points or farm-gates downstream of the point of measurement needed to install, measure, maintain, operate, and monitor a measurement device.

Recommendation: Revise subpage 597.3(b)(2)(A) to read as follows:

When applicable, to demonstrate lack of legal access at customer delivery points or farm-gates downstream of the point of measurement, the agricultural water supplier shall provide documentation self-certify to the Department from legal counsel to the water supplier that it lacks legal authority to obtain access to the farm gate and has sought and been denied access from its customers to measure water at those customer delivery points or farm-gates.

(ii) Single Measurement Device Exemption (Exhibit 3b)

Recommendation: Revise subpart 597.3(b)(1)(B) as follows:

The measurement options in §597.3(a) cannot be met, as approved by an engineer, by installing a single one or more commercially available measurement device(s) at each of the ~~downstream customer delivery points or~~ farm-gates because small differentials in water level or large fluctuations in flow rate or velocity occur during the delivery season at those delivery points or farm-gates. When a water measurement device becomes commercially available that can meet the measurement options in §597.3(a)(2) at the ~~customer delivery points or~~ farm-gates, an agricultural water supplier shall include in its Agricultural Water Management Plan a schedule, budget and finance plan to measure water at the individual customer delivery points in compliance with §597.3(a) of this Article prior to the adoption of the subsequent Agricultural Water Management Plan.

Recommendation: Revise subpart 597.3(b)(2)(B) as follows:

When applicable, the agricultural water supplier shall document ~~that~~ the specific field or flow condition(s) described in §597.3(b)(1)(B) that exist at customer delivery points or the farm-gates downstream of the point of measurement. The documentation, which shall be submitted to the Department each year that this provision is in effect, shall include the specific field or flow conditions, including but not limited to flow, head loss, canal stability, crop selection, on farm practices, and any other factors that preclude accurate measurement at the farm gate, and shall be attested to and approved by an engineer. The documentation shall also include a summary of the agricultural water supplier's efforts during the previous twelve months to obtain commercially available measurement device(s) that meet the requirements of section 597.3(a)(1).

RECOMMENDATION #3: Revise accuracy standards to 5% and 10% for existing and new measurement devices (Exhibit 2c)

Recommendation: Revise subpart 597.3(a)(1) as follows:

a) Measurement Options at the Delivery Point or Farm-gate of a Single Customer

An agricultural water supplier shall measure water delivered at the delivery point or farm-gate of a single customer using one of the following measurement options. The stated numerical accuracy for each measurement option is for the volume delivered. If a device measures a value other than volume, for example, flow rate, velocity or water elevation, the accuracy certification must incorporate the measurements or calculations required to convert the measured value to volume as described in §597.4(e).

- 1) An existing measurement device shall be certified to be accurate to within ~~±10~~^{±12}% by volume.

and,

- 2) A new or replacement measurement device shall be certified to be accurate to within:
 - A) ±5% by volume in the laboratory if using a laboratory certification;
 - B) ±10% by volume in the field if using a non-laboratory certification.

Recommendation: Revise subpart 597.3(b) as follows:

An agricultural water supplier may measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers using one of the measurement options and accuracy standard described in §597.3(a) if the downstream customer delivery points or farm-gates meet either of the following conditions:

RECOMMENDATION #4: Eliminate “field inspection” as a certification method

Discussion: In prior oral comments to the Commission and Department, we have noted that there are no criteria that demonstrate that “field inspection” ensures the accurate measurement of water

that is delivered. Unfortunately, the current draft does not provide any standard criteria for field inspections, and the draft regulation does not adequately demonstrate that field inspections will ensure the accuracy of the measurement device. Indeed, there is no definition of what constitutes field inspection. Because it does not require testing the accuracy of any of the measurement devices, field inspection appears inadequate to demonstrate and ensure sufficient accuracy of reported water delivery data. Until such time that the regulation includes standards and criteria to ensure that field inspection can demonstrate that measurement devices achieve the accuracy standard, field inspection should be deleted from the draft regulation.

Recommendation: Revise Section 597.4 to delete references to field inspection, including deleting subparts 597.4(a)(1)(B), 597.4(a)(2)(B)(ii), and 597.4(b)(3).

CONCLUSION

We strongly urge the Commission to incorporate these changes to the draft agricultural water measurement regulations, to ensure that the regulations comply with the statutory requirements and advance sound public policy.

Thank you for consideration of our views. We look forward to discussing these issues with the Commission at its meeting on June 15.

Sincerely,

Doug Obegi
Natural Resources Defense Council

Jim Metropulos
Sierra Club California

Dr. Juliet Christian-Smith
Pacific Institute



May 17, 2011

Mr. Anthony Saracino
Chair, California Water Commission
Department of Water Resources
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Sacramento, CA 94236

SENT VIA EMAIL TO cwc@water.ca.gov

RE: The Draft Agricultural Water Measurement Regulation Fails to Comply with SB 7x 7 and Must be Revised

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With respect to agricultural water efficiency, the Act requires water suppliers to, “[m]easure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10,” and to implement volumetric pricing. Water Code § 10608.48(b). Additional practices to improve efficiency are required to be implemented if they are technically feasible and locally cost effective. *Id.* § 10608.48(c). The Act incorporates and strengthens agricultural water measurement requirements of AB 1404 of 2007 (Asm. Laird).

We appreciate that the Department of Water Resources eliminated the exemption for CVP contractors in its May 3, 2011 draft regulations, following our repeated comments that this proposed exemption clearly violated the requirements of the Act. However, the draft agricultural water measurement regulation still fails to comply with the statutory requirements of the Act in several key respects.

- The draft regulation fails to require measurement of water deliveries to individual customers at the farm gate, as the Act intends, and instead allow measurement of water deliveries to multiple farmers.
- The draft regulation fail to require accurate measurement of the volume of water delivered to customers, allowing instead the certification of the accuracy of flow rate or velocity, which alone do not constitute volume.

In addition, the draft regulation includes several provisions that appear to weaken the measurement requirements, despite the Act's clear intent. Most importantly, the draft regulation allows for a poorly defined process of "field analysis" of existing water measurement devices, instead of requiring testing of a representative sample of measurement devices to ensure their accuracy.¹ Another provision of the draft regulation² imposes no deadline to ever replace, repair, or upgrade measurement devices that are determined to be inaccurate. Both of these provisions fail to ensure the accuracy of the reporting data, and both provisions should be either strengthened or removed from the regulation.

On the pages that follow, we have provided more detail on these key issues, and we have recommended language to ensure the final regulations are consistent with the statutory requirements of the Act.

Thank you for consideration of our views. Please feel free to contact us at your convenience if you have any questions or concerns.

Sincerely,

Doug Obegi
Natural Resources Defense Council

Jim Metropulos
Sierra Club California

Dr. Juliet Christian-Smith
Pacific Institute

¹ Section 597.4(a) calls for testing a statistically representative sample of previously installed measurement devices, and then 597.4(b) inexplicably recommends that testing be capped at 100 individual devices regardless of the number of devices that would actually constitute a statistically representative sample. Thus the regulation does not require testing a statistically representative sample of the measurement devices, as it should.

² Sec. 597.4(d)(2) and (3).

Recommended Changes to the Draft Agricultural Water Measurement Regulation to Comply with the Water Conservation Act of 2009

(1) The Draft Regulation Fails to Require Measurement of Water Deliveries to Customers at the Farm Gate

Section 597.3(b) of the draft regulation authorizes agricultural water suppliers to avoid the requirement to measure water deliveries at the farm gate, and instead allows measurement upstream of the customer delivery point. This exemption from measurement of water delivery at the farm gate is allowed if: (i) the supplier does not currently have access to the customer delivery point; or (ii) if the accuracy standard cannot be met with a single measurement device, “such as occurs for rice cultivation.” As a result, DWR’s economic analysis expects that half of all acreage subject to the regulation in the Sacramento Valley will not be measured at the farm gate. *See* DWR, Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement, April 22, 2011, at p. 10.

California is the number two rice producing state in the nation, and in 2010, over 550,000 acres of rice were harvested (nearly all from six contiguous counties in the Sacramento Valley), an amount of harvested acreage that was second only to hay among all crops harvested statewide. With an average water duty of five acre-feet per acre, rice production draws nearly 3 million acre-feet of water per year, a staggering amount roughly equal to the customer demand of five cities the size of Los Angeles. Nothing in the language of the statute suggests any legislative intention that such a significant sector of agricultural water use – indeed, such a significant portion of water use statewide – should be broadly exempt from the state’s farm-gate measurement requirement. Neither of these exemptions is consistent with the requirements of the Act, and both exemptions should be revised so that narrow exemptions are provided for the small number of farmers that truly cannot comply with the critical measurement requirement.

(i) Lack of Access Exemption

As currently drafted, section 597.3(b)(A)(i) of the draft regulation allows water suppliers to avoid measuring water deliveries to customers at the farm gate if the water supplier currently lacks access to the customer delivery point (farm gate).³ Some water suppliers may have never needed legal access to the farm gate, but are authorized by law to acquire such access. Indeed, the current draft language does not even require a water supplier to ask to obtain access, let alone use its legal authorities to do so. This exception is overbroad and is inconsistent with the intent and requirements of the Act, and the language should be revised to provide a more narrowly drawn exception that is consistent with the intent of the law.

³ The term “customer delivery point” in the draft regulations is unnecessary and introduces additional confusion. Instead, the draft regulations should cross-reference the definition of “farm gate” in section 531(f) of the Water Code (““Farm-gate” means the point at which water is delivered from the agricultural water supplier’s distribution system to each of its customers.”).

RECOMMENDATION: Revise subpart 597.3(b)(A)(i) to read as follows:

(A)(i) The agricultural water supplier does not have, and lacks the legal authority to obtain, sufficient access to allow for the installation, operation, and maintenance of measurement devices at customer delivery points.

(ii) Single Measurement Device Exemption

There is no basis in law for the “single measurement device” exemption in section 597.3(b)(A)(ii) of the draft regulation. This exemption appears to be an attempt to incorporate a “locally cost effective” exemption into the regulation, notwithstanding the statutory requirements to the contrary. As noted earlier, the Act incorporates and builds on the requirements of section 531.10(a) of the Water Code, which was enacted as part of AB 1404 of 2007 (Laird). Section 531.10(a) requires agricultural water suppliers to report farm-gate water delivery data, and section 531.10(b) exempts suppliers from having to comply with this and other requirements of AB 1404 if the programs or practices are not locally cost effective.

However, two provisions of SB 7x 7 conclusively demonstrate that a “locally cost effective” exemption does not apply to the measurement requirement: first, the Act includes explicit cost-effectiveness exemptions for other efficiency practices, but not with respect to water measurement and volumetric pricing requirements; and second, the 2009 legislation did not reference or incorporate subdivision (b) of section 531.10 (the locally cost effective exemption of AB 1404), instead only referencing subdivision (a) of section 510.10. *Id.* § 10608.48(c).

While we recognize that installation of a second measurement device if needed for accurate measurement would increase costs of compliance, the Legislature has determined that local cost effectiveness is not a valid exemption from the requirement to measure the volume of water delivered to customers at the farm gate. Limiting this language to one measurement device is an unreasonable interpretation of and contrary to the language of the statute.

Additionally, any exemption based upon an unavailability of equipment to accomplish the measurement task should require periodic recertification, to account for improvements in measurement technology in future years.

RECOMMENDATION: Revise section 597.3(b)(A)(2) to read as follows:

The agricultural water supplier has determined that the applicable accuracy standard of 597.3(a) cannot be met with commercially available measurement devices, where the agricultural water supplier provides documentation of the flow rates, elevations, and operating conditions that make it impossible to measure volume at each customer turnout for which the measurement exemption is claimed, and these data and the finding have been reviewed, signed and stamped by a registered Professional Engineer. An agricultural water supplier that utilizes the provisions of this section must demonstrate compliance with this section every three years, to account for changes in technology or cultural practices that may enable compliance with section 597.3(a).

(2) The draft regulation fails to require the measurement of volume with sufficient accuracy

The Act requires the water supplier to “[m]easure the volume of water delivered to customers with sufficient accuracy to comply with section 531.10(a)” and implement volumetric pricing. Water Code § 10608.48(b) (emphasis added). However, the current draft regulations fail to require accurate measurement of the volume of water deliveries, because it allows for the certification of the accuracy of either flow rate or flow velocity measurements, instead of requiring certification of the accuracy of the volume of water deliveries to the customer.










Sections 597.3(a) and (b) of the draft regulation provide numeric accuracy standards, but these sections only require the measurement be certified to be accurate “by flow rate, velocity or volume.” Similarly, section 597.2(a)(1) defines accuracy to mean the measured “flow rate, velocity or volume relative to the actual flow rate, velocity or volume.”

However, no provision of the draft regulation requires the *measurement of the volume of water* deliveries be accurate. Neither flow rate nor flow velocity constitute volume without the addition of additional variables, which themselves are subject to measurement error. Although water suppliers are required to document the procedures used to convert measured flow rate or flow velocity into volume, *see* draft regulation § 597.4(d)(4), no criteria are established for the level of accuracy of the computed volume resulting from such procedures. It should be noted that the Bureau of reclamation's conservation criteria for CVP contractors is stated as an accuracy standard for volume. Thus, the current draft of the DWR regulation is substantially weaker than the standard applicable to most federal irrigation contractors today.


The statutory language plainly requires sufficiently accurate measurement of the volume of water deliveries, which is not interchangeable with velocity or flow rate. The accuracy band applied to each of these terms will not be identical, because the measurement of either velocity or flow rate alone is not sufficient to provide a measurement of volume, but rather requires additional measurements, such as cross section (in the case of velocity) and time (in the case of flow rate).

RECOMMENDATION: Revise Section 597.2(a)(1) to delete the words “flow rate” and “velocity” from the definition of “accuracy”, and revise Sections 597.3(a) and (b) to delete the words “flow rate” and “velocity” from the range of options for agricultural water measurement.



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Good morning ASC Members, Alternates and other interested parties:

DWR submitted the Emergency Regulation for agricultural water measurement to the Office of Administrative Law (OAL) on June 24, 2011. OAL notified DWR staff they would reject the regulation in its entirety if DWR failed to remove the "or future amendments" phrase from the agricultural water suppliers subject to CVPIA or RRA provision of the regulation. OAL also strongly urged DWR to remove the entire provision regarding agricultural water suppliers subject to the CVPIA or RRA.

DWR staff submitted the Emergency Regulation without the "or future amendments" phrase to keep the public review process moving forward, but did not feel they had the authority to remove the entire provision. OAL approved the Emergency Regulation on July 5th. DWR staff will submit the Proposed Permanent Regulation to the OAL soon, which will begin a 45-day public comment period ahead, providing more time for DWR and the CWC to resolve this and any other remaining issues. You will receive a notification of the Permanent Regulation meeting place and time of Public Hearings and public comment period.

We are planning for the ASC meetings to restart the Project A1- Methodology for Quantification of Efficiency of Agricultural Water Use and other projects. The next meeting of the ASC will be in early August and we will be sending you the details in the near future